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No. 01-1024

In the Supreme Court of the United States

PHOEBE THOMPSON, ET AL., PETITIONERS

v.

STATE OF COLORADO, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether Title II of the Americans with Disabilities Act of 1990, 42 U.S.C. 12131-12165 (1994 & Supp. V 1999), is a proper exercise of Congress's power under Section 5 of the Fourteenth Amendment, thereby constituting a valid exercise of congressional power to abrogate the States' Eleventh Amendment immunity from suit by individuals.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3-30), as amended on rehearing (Pet. App. 1-2), is reported at 278 F.3d 1020. The order of the district court (Pet. App. 31-33), and the accompanying report and recommendation of the magistrate judge (Pet. App. 34-61), are reported at 29 F. Supp. 2d 1226.

JURISDICTION

The court of appeals entered its judgment on August 7, 2001. A petition for rehearing was denied on October 9, 2001. Pet. App. 1-2. The petition for a writ of certiorari was filed on January 7, 2002. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Americans with Disabilities Act of 1990 (Disabilities Act), 42 U.S.C. 12101 *et seq.*, is a "comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. 12101(b)(1). The Disabilities Act targets three particular areas of discrimination against persons with disabilities. Title I, 42 U.S.C. 12111-12117, addresses discrimination by employers affecting interstate commerce; Title II, 42 U.S.C. 12131-12165 (1994 & Supp. V 1999), addresses discrimination by governmental entities; and Title III, 42 U.S.C. 12181-12189 (1994 & Supp. V 1999), addresses discrimination in public accommodations operated by private entities. In passing the Disabilities Act, Congress "invoke[d] the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities." 42 U.S.C. 12101(b)(4).

By its terms, the Disabilities Act's prohibitions on discrimination are enforceable through private suits against public entities. See 42 U.S.C. 12133; see also *Olmstead* v. *L.C.*, 527 U.S. 581, 590 (1999). In the Disabilities Act, Congress expressly abrogated the States' Eleventh Amendment immunity to private suits in federal court. 42 U.S.C. 12202 (a "State shall not be immune under the eleventh amendment to the Constitution of the United States from an action in Federal or State court of competent jurisdiction for a violation of this chapter").

This case involves a suit under Title II of the Disabilities Act, which provides that "no qualified individual with a disability shall, by reason of such disability,

be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. 12132. A "public entity" is expressly defined to include "any State or local government" and "any department, agency, special purpose district, or other instrumentality of a State or States or local government." 42 U.S.C. 12131(1)(A) and (B).[1]

Congress instructed the Attorney General to issue regulations implementing the provisions of Title II. See 42 U.S.C. 12134(a); see generally 28 C.F.R. Pt. 35. Those regulations, Congress further directed, "shall include standards applicable to facilities and vehicles covered by this part" that are "consistent with the minimum guidelines and requirements issued by the Architectural and Transportation Barriers Compliance Board." 42 U.S.C. 12134(c). To ensure that newly constructed facilities are accessible to people with disabilities, the regulations require that, "[i]f parking spaces are provided for self-parking by employees or visitors, or both, then accessible spaces * * * shall be provided in each such parking area" in a number proportional to the number of total parking spaces. 28 C.F.R. Pt. 36, App. A, § 4.1.2(5); see 28 C.F.R. 35.151(c) (incorporating standards).[2] Each space must be

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[1] While the Disabilities Act does not apply to the federal government, substantially similar protections are provided by Section 504(a) of the Rehabilitation Act of 1973, 29 U.S.C. 794(a), which has governed "any program or activity conducted by any Executive agency" since 1978. In addition, Congress has extended the obligations of the Disabilities Act to itself. See 2 U.S.C. 1331(b)(1) (1994 & Supp. V 1999).

[2] 28 C.F.R. 35.151(c) permits public entities subject to Title II to select between these standards and the Uniform Federal Accessibility Standards, 41 C.F.R. Pt. 101-19.6, App. A. With respect to

"designated as reserved by a sign showing the symbol of accessibility." 28 C.F.R. Pt. 36, App. A, § 4.6.4. Accessible parking must also be provided in existing facilities when necessary in order to assure that programs, services, and activities of an entity are accessible to people with disabilities. See 28 C.F.R. 35.150.

At issue in this case is a general regulatory prohibition that forbids public entities from "plac[ing] a surcharge on a particular individual with a disability or any group of individuals with disabilities to cover the costs of measures, such as the provision of auxiliary aids or program accessibility, that are required to provide that individual or group with the nondiscriminatory treatment required by the Act or this part." 28 C.F.R. 35.130(f).

2. Respondent State of Colorado permits cars to park in parking spaces "reserved for use by persons with disabilities" only if the car has a special license plate or removable windshield placard that indicates that the car is being used to transport a person with a mobility impairment. Pet. App. 5; Colo. Rev. Stat. § 42-4-1208(3)(a) (Supp. 1996). It is otherwise a crime to park in the spots designated for handicapped persons. See *id.* § 42-4-1208(5). Colorado charges no extra fee for the issuance of handicapped license plates, but, for persons with permanent disabilities, charges a fee for a handicapped parking placard. Pet. App. 5; Colo. Rev. Stat. § 42-3-121(2)(a)(II) (Supp. 1996). The amount of the fee may not exceed the actual cost of issuing the placard, *id.* § 42-3-121(2)(a)(I), which, at the time of briefing before the court of appeals, was $2.25 for a

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parking requirements, the two sets of standards are virtually identical, see 41 C.F.R. Pt. 101-19.6, App. A, §§ 4.1.1(5), 4.6.

three-year authorization. Persons with temporary disabilities are not charged any fee for a placard, which is valid for 90 days. Appellant's C.A. App. 24.

Petitioners are persons with disabilities, within the meaning of the Disabilities Act (42 U.S.C. 12102(2)), who purchased placards so that they could park in accessible parking spaces. Pet. App. 5. They filed a lawsuit under Title II of the Disabilities Act against the State of Colorado, alleging that the fee violated 28 C.F.R. 35.130(f). Although the complaint sought both declaratory and injunctive relief and a refund of all previously paid fees, petitioners moved for summary judgment solely on their requests for declaratory and injunctive relief. Pet. App. 5-6. Colorado defended, in part, on the ground that the Eleventh Amendment barred the suit.

The magistrate judge, in an opinion adopted by the district court, held that Title II of the Disabilities Act validly abrogated the States' Eleventh Amendment immunity. Pet. App. 31-33, 34-61. The court found that Title II of the Disabilities Act was a proper exercise of Congress's power under Section 5 of the Fourteenth Amendment because it was "enacted to remedy and prohibit arbitrary discriminatory action by the states on the basis of disability." *Id.* at 55. The court further found that the placard fee violated 28 C.F.R. 35.130(f) and enjoined respondent from requiring payment of a fee for receipt of a parking placard. Pet. App. 32, 38-45.

3. The United States intervened on appeal, pursuant to 28 U.S.C. 2403(a), solely to defend the constitutionality of Congress's abrogation of the States' Eleventh Amendment immunity. The court of appeals reversed. Pet. App. 1-30. The court acknowledged (*id.* at 14-16) that this Court, in *Board of Trustees of University of Alabama* v. *Garrett*, 531 U.S. 356 (2001), specifically

reserved the question of whether the abrogation of Eleventh Amendment immunity for Title II was valid. Applying *Garrett*'s analytical framework, the court concluded that there was "some evidence in the congressional record that unconstitutional discrimination against the disabled exists in government 'services, programs, or activities.'" Pet. App. 27. The court further found that an even larger number of incidents involved "refusals by public entities to make accommodations," *ibid.*, which would be unconstitutional if invidiously motivated and which might be unconstitutional even in the absence of such illicit motives, *id.* at 22-25. The court nevertheless concluded that the evidence of discrimination was insufficient to justify the obligations imposed on States by Title II and, thus, that the abrogation of Eleventh Amendment immunity was invalid for Title II. The court stressed that "*Ex parte Young* [209 U.S. 123 (1908)] suits seeking prospective injunctive relief * * * are not prohibited by this opinion." *Id.* at 30 n.11. Petitioners could not avail themselves of that exception, however, because they had failed to name any state officials as defendants. *Id.* at 10-11 n.2.

ARGUMENT

Petitioners are correct (Pet. 4-5) that the question of Congress's power to abrogate the States' Eleventh Amendment immunity for claims under Title II of the Disabilities Act is an important question that may merit review by this Court at the appropriate time and in the appropriate case.[3] This, however, is not that case. To

[3] Since this Court's decision in *Board of Trustees of University of Alabama* v. *Garrett*, 531 U.S. 356 (2001), which invalidated the abrogation of Eleventh Amendment immunity for Title I of the Disabilities Act, the courts of appeals addressing abrogation for

the contrary, there are significant jurisdictional and prudential barriers to granting plenary review here.

1. This case contains a potential bar to federal jurisdiction that is distinct from the Eleventh Amendment question presented and that could prevent resolution of that question in this case. The Tax Injunction Act, 28 U.S.C. 1341, denies federal courts jurisdiction over actions to "enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State." Colorado raised the Tax Injunction Act as an affirmative defense in the district court, Appellant's C.A. App. 17, and the issue of whether the fee assessment for parking placards constitutes a "tax" under state law was briefed by petitioners in their motion for summary judgment, *id.* at 85-91.

Although the issue was not passed upon by either court below, the Tax Injunction Act is a "broad juris-

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Title II of the Disabilities Act have reached differing results. The Fifth and Eighth Circuits have held that the abrogation for Title II suits cannot be sustained as valid Section 5 legislation. See *Reickenbacker* v. *Foster*, 274 F.3d 974 (5th Cir. 2001); *Randolph* v. *Rodgers*, 253 F.3d 342, 345 n.4 (8th Cir. 2001). The Ninth Circuit has upheld the abrogation. See *Hason* v. *Medical Bd. of Cal.*, 279 F.3d 1167 (2002), petition for reh'g en banc filed (Feb. 25, 2002). The Second Circuit has held that the abrogation can be sustained for a subset of Title II cases. *Garcia* v. *S.U.N.Y. Health Sciences Ctr.*, 280 F.3d 98 (2001) (construing Title II's remedial provisions to authorize damage awards against States only if the action was taken with "discriminatory animus or ill will towards the disabled"). The Sixth Circuit, in *Popovich* v. *Cuyahoga County Court of Common Pleas*, 276 F.3d 808 (2002) (en banc), upheld the abrogation as appropriate legislation to enforce the Due Process Clause, at least as applied to require accommodations for a hearing-impaired father to enable him to participate in child custody proceedings.

dictional barrier" that imposes "fundamental[ly] importan[t]" restrictions on federal courts. *Arkansas* v. *Farm Credit Servs.*, 520 U.S. 821, 825-826 (1997). Unlike the Eleventh Amendment, the Tax Injunction Act is a non-waivable limitation on the courts' subject-matter jurisdiction and thus must be raised by courts *sua sponte*. See, *e.g.*, *Folio* v. *City of Clarksburg*, 134 F.3d 1211, 1214 (4th Cir. 1998); *Thompson* v. *County of Franklin*, 15 F.3d 245, 248 n.3 (2d Cir. 1994); *Trailer Marine Transp. Corp.* v. *Rivera Vazquez*, 977 F.2d 1, 5 (1st Cir. 1992); *Burris* v. *City of Little Rock*, 941 F.2d 717, 721 (8th Cir. 1991); *Hoohuli* v. *Ariyoshi*, 741 F.2d 1169, 1176 (9th Cir. 1984).[4]

Courts have reached differing results on the question of whether analogous charges for parking placards constitute a "tax," in light of varying state law provisions regarding the amount and disposition of the fee. Compare *Neinast* v. *Texas*, 217 F.3d 275 (5th Cir. 2000) (charge is not a tax), cert. denied, 531 U.S. 1190 (2001); *Hexom* v. *Oregon Dep't of Transp.*, 177 F.3d 1134 (9th Cir. 1999) (same); *Marcus* v. *Kansas Dep't of Rev.*, 170 F.3d 1305 (10th Cir. 1999) (same); *Thrope* v. *Ohio*, 19 F. Supp. 2d 816 (S.D. Ohio 1998) (same), with *Hedgepeth* v. *Tennessee*, 215 F.3d 608 (6th Cir. 2000) (charge is a tax);

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[4] At the time the District Court ruled in this case (Pet. App. 31), the Tenth Circuit had held that Eleventh Amendment issues should be resolved before reaching the applicability of the Tax Injunction Act because "the statutory limitations of the Tax Injunction Act are not jurisdictional." *ANR Pipeline Co.* v. *Lafaver*, 150 F.3d 1178, 1186 n.8 (10th Cir. 1998), cert. denied, 525 U.S. 1122 (1999). The Tenth Circuit has since retreated from that position. See *Marcus* v. *Kansas Dep't of Rev.*, 170 F.3d 1305, 1309 n.2 (10th Cir. 1999) (noting that, notwithstanding *ANR Pipeline*, "[i]n accordance with * * * Supreme Court precedents, we treat the Tax Injunction Act as a bar to federal jurisdiction").

Lussier v. *Florida*, 972 F. Supp. 1412 (M.D. Fla. 1997) (same); *Rendon* v. *Florida*, 930 F. Supp. 601 (S.D. Fla. 1996) (same). Because the character of the placard fee is largely a function of state law, the United States takes no position on the ultimate question of the Tax Injunction Act's applicability to this case. But the existence of such a non-constitutional, jurisdictional question, which would be heavily influenced by matters of state law undeveloped in the record below, stands as a significant potential obstacle to this Court's resolution of the Eleventh Amendment question presented.

2. A logical antecedent to adjudicating the question petitioners present for review is resolution of the non-constitutional issue of whether, as a matter of regulatory interpretation, the assessment of a fee for parking placards is prohibited by Title II. That inquiry turns upon whether parking placards for disabled persons are "required to provide that individual or group with the nondiscriminatory treatment required by the [Disabilities Act]," within the meaning of the relevant Justice Department regulation, 28 C.F.R. 35.130(f). That is an interpretive question about which there is substantial debate. Compare *Dare* v. *California*, 191 F.3d 1167, 1172-1173 (9th Cir. 1999), cert. denied, 531 U.S. 1190 (2001), with *id.* at 1177-1181 (Fernandez, J., dissenting). While the Justice Department has not yet formulated a final position on the question, our initial review indicates that the parking placard fee does *not* violate the regulation. That is because such placards are not "required" to provide nondiscriminatory access to buildings or facilities. Colorado already provides such access for drivers with disabilities by offering special license plates at no additional charge, which allow the drivers to utilize the parking spots reserved for persons with disabilities. The placard fee here thus

can be understood as a fee for an alternative means of providing access, but not as a surcharge for the program accessibility that is "required" by the Disabilities Act. 28 C.F.R. 35.130(f). The license plate alone provides the access "required to provide * * * the nondiscriminatory treatment required by the Act." *Ibid.*

Although Colorado argued before the district court that the fee did not violate the regulation (see Pet. App. 42-45), the court of appeals did not address that interpretive issue in its decision.[5] But "[i]t is not the habit of the Court to decide questions of a constitutional nature unless absolutely necessary to a decision of the case." *Ashwander* v. *Tennessee Valley Auth.*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring). Because the petition asks this Court to "anticipate a question of constitutional law in advance of the necessity of deciding it," *id.* at 346, further review should not be granted.

Furthermore, application of this Court's "now familiar principles," *Board of Trustees of Univ. of Ala.* v. *Garrett*, 531 U.S. 356, 365 (2001), for evaluating the propriety of Section 5 legislation, requires evaluation of the "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end" by the legislation, *ibid.* (quoting *City of Boerne* v. *Flores*, 521 U.S. 507, 520 (1997)). A case in which the application of Title II is so questionable provides a distinctly awkward vehicle in which fairly to assess congruence and proportionality, or otherwise to evaluate the practical scope and operation of Title II.

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[5] The Department did not address the merits of the parties' positions either, having intervened to defend the constitutionality of the abrogation of Eleventh Amendment immunity. See 28 U.S.C. 2403.

Indeed, since *Garrett*, this Court has denied certiorari in two other cases presenting the same parking placard claims. See *Dare* v. *California*, *supra* (sustaining Title II's abrogation of Eleventh Amendment immunity); *Brown* v. *North Carolina Div. of Motor Vehicles*, 166 F.3d 698 (4th Cir. 1999) (abrogation of Eleventh Amendment immunity invalidated), cert. denied, 531 U.S. 1190 (2001).

While the Court traditionally favors the resolution of jurisdictional questions before the merits of parties' claims are addressed, see *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 89-102 (1998), that precept does not translate readily to jurisdictional objections based on the Eleventh Amendment, which does not operate like a traditional limitation on subject matter jurisdiction:

> The Eleventh Amendment * * * does not automatically destroy original jurisdiction. Rather, the Eleventh Amendment grants the State a legal power to assert a sovereign immunity defense should it choose to do so. The State can waive the defense. * * * Nor need a court raise the defect on its own.

Wisconsin Dep't of Corrs. v. *Schacht*, 524 U.S. 381, 389 (1998) (citations omitted); see also *id.* at 394-395 (Kennedy, J., concurring); *Idaho* v. *Coeur d'Alene Tribe*, 521 U.S. 261, 267 (1997) (Eleventh Amendment "enacts a sovereign immunity from suit, rather than a nonwaivable limit on the Federal Judiciary's subject-matter jurisdiction"). In particular, where the Eleventh Amendment question is one of abrogation under Section 5, the justification for addressing jurisdictional questions first is further attenuated because, as noted, the inquiry into congruence and proportionality neces-

sarily requires a fair understanding of the statute's actual scope and operation, which in turn may necessitate at least a quick look at the merits. In fact, in this case, Colorado first urged the court of appeals to enter judgment for it on the merits (Resp. C.A. Br. 13-23), and then secondly briefed the argument (*id.* at 24) that, "[e]ven if the Court concludes that Title II" bars the fee, the Eleventh Amendment prevented the case from proceeding.

At a minimum, the prospect of courts routinely declaring unconstitutional laws duly enacted by the Congress and signed by the President based on their purely hypothesized application to challenged state action—especially when that application is subject to substantial debate—raises constitutional concerns that lie at the core of the *Ashwander* principle of constitutional avoidance, and that likewise should weigh heavily in this Court's exercise of its certiorari jurisdiction. Indeed, in *Garrett*, this Court dismissed as improvidently granted the question of whether the Title II abrogation was valid Section 5 legislation precisely because the parties had not briefed the question whether Title II was applicable to the claims at issue in that case. "We are not disposed to decide the constitutional issue whether Title II * * * is appropriate legislation under § 5 of the Fourteenth Amendment when the parties have not favored us with briefing on the statutory question." *Garrett*, 531 U.S. at 360 n.1.

3. This case presents a peculiarly inappropriate vehicle for certiorari because it is in a profoundly interlocutory character, such that this Court's review may ultimately be unnecessary to afford petitioners the relief their summary judgment motion sought. Although petitioners' complaint sought monetary compensation, their summary judgment motion sought

exclusively declaratory and injunctive relief. Pet. App. 6. Thus, in the case's current procedural posture, the only issue presented to this Court for review is the denial of declaratory and injunctive relief on Eleventh Amendment grounds.

The court of appeals, however, specifically noted that "*Ex parte Young* suits seeking prospective injunctive relief * * * are not prohibited by this opinion." Pet. App. 30 n.11. Petitioners could not avail themselves of *Ex parte Young* on appeal because their complaint did not name any state officials as defendants. *Id.* at 10 & n.2. On remand, petitioners moved to amend their complaint to add an individual state official as a defendant (R. 97), to bring themselves within the court of appeals' exception for declaratory and injunctive relief sought on an *Ex parte Young* basis. While the district court denied that motion to amend (R. 100), the petitioners' appeal of that denial is currently pending before the court of appeals (No. 02-1036). Were the court of appeals to reverse the district court and permit amendment, this Court's resolution of the question presented would be entirely unnecessary to afford petitioners the relief their summary judgment motion sought. And even if the judgment is affirmed on appeal, the court of appeals' decision does not foreclose any litigant in the Tenth Circuit, with a properly styled complaint, from obtaining the very declaratory and injunctive relief petitioners seek. Thus, in its present procedural posture, this case asks the essentially hypothetical question of whether a party, who could obtain purely equitable relief available under *Ex parte Young*, also can obtain that same relief directly against a State without running afoul of the Eleventh Amendment. But resolution of that question is of no practical consequence to any litigant who complies with the pleading

requirements of *Ex parte Young*. In short, an exercise of this Court's certiorari jurisdiction is not warranted simply to relieve petitioners of the consequences of their pleading and summary judgment strategies.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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